Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-895 (2)

In the Supreme Court of the United States

OCTOBER TERM 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

BRIEF OF RESPONDENT COAST DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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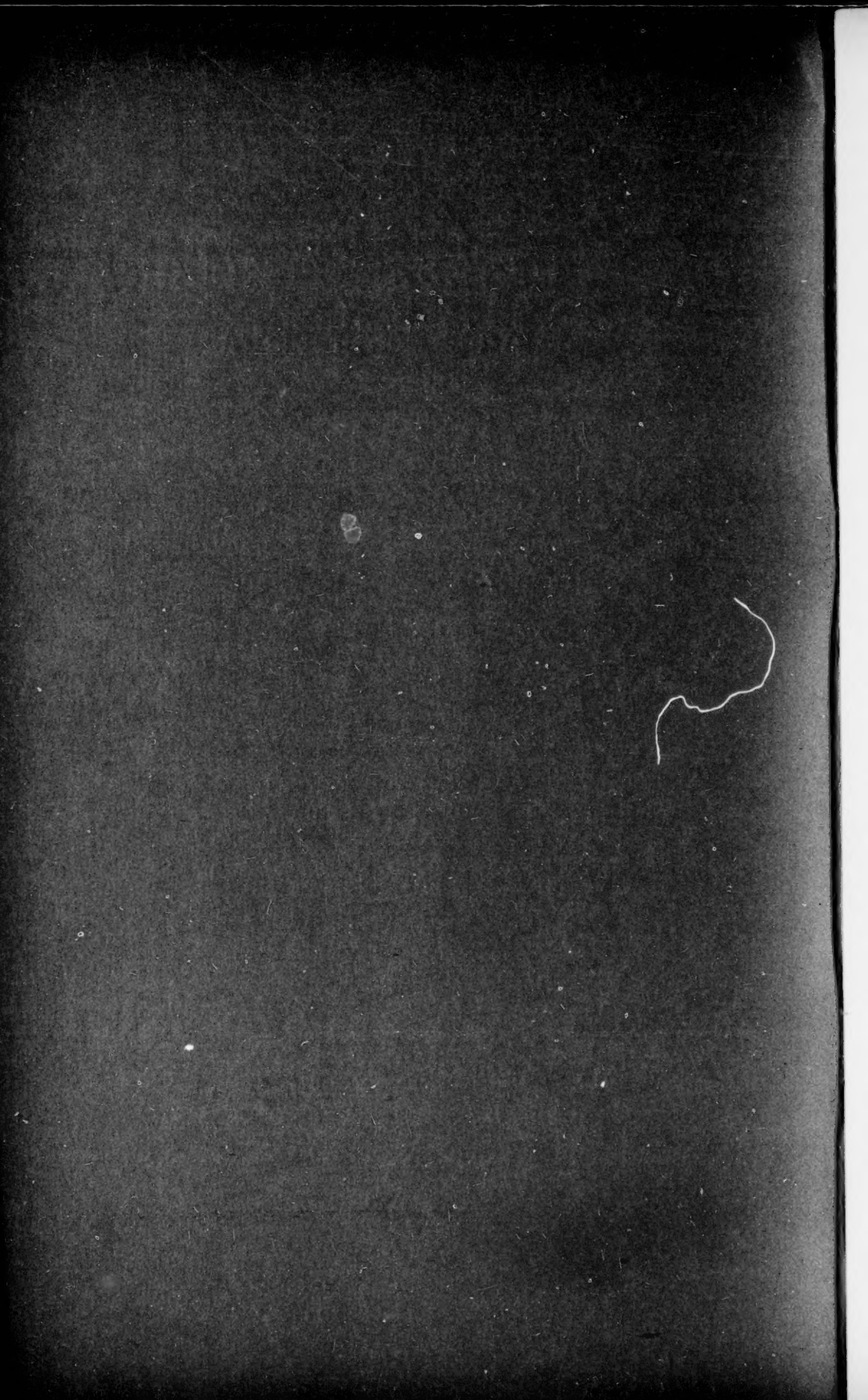

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BRIEF OF RESPONDENT COAST DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respondent Coast Distributors, Inc. ("Coast"), a defendant below, submits this brief in support of the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals filed by the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon. [1]

STATEMENT OF THE CASE

Coast adopts the Statement of the Case set forth in the Petition.

Coast supplements the Statement of the Case in the Petition as follows with regard to the rulings in the district court concerning the beer and wine distributors who were involved in the case.

In the district court Coast and several other distributors were named as defendants individually and as representatives of a purported class of other similarly situated distributors. No defendant class was ever certified. Appendix B to the Petition sets forth the January 24, 1984 order of the district court granting the state defendants' motion for summary judgment. *See* Petition, Appendix B at App-34. In that order, the district court reserved decision on the distributors' mo-

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[1] Coast has no parent, subsidiary or affiliated corporations. Spear Beverage Co., also a named defendant below, was liquidated while the case was pending, and is no longer in existence.

tion for summary judgment, and allowed the plaintiffs 20 days to submit additional evidence of concerted action among the distributors. *Id.* The Court indicated that the evidence submitted by the plaintiffs up to that point was not sufficient to show any concerted action among the distributors, and that if the plaintiffs did not file additional evidence within 20 days, the Court would grant the distributors' motion. *Id.*

Following the order, the plaintiffs did not submit any additional evidence. Accordingly, on March 9, 1984, the district court entered judgment in favor of the distributors.

In the decision below, the Ninth Circuit affirmed the district court's judgment in favor of the distributors on the ground that "there is no evidence of concerted action" among the distributors. Petition, Appendix A at App-13 n. 4.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The decision below is in direct conflict with decisions of the Second Circuit Court of Appeals, the New York Court of Appeals, the Minnesota Supreme Court, the Missouri Supreme Court and two United States District Courts on an important issue of constitutional law.

The Court below held the Oregon price posting rules to be a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1987), and therefore subject to preemption by that statute under the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2. Petition, Appendix A at App-13. The Court then held that state

action immunity did not save the Oregon rules from preemption because of a lack of active supervision by the state. Petition, Appendix A at App-15.

The decision below holding the Oregon price posting rules to be a *per se* violation of Section 1 of the Sherman Act is in direct conflict with decisions of the Second Circuit Court of Appeals, the New York Court of Appeals, the Minnesota Supreme Court, the Missouri Supreme Court, and two United States District Courts, all holding that substantially similar price posting laws in other states are not a *per se* violation of Section 1 of the Sherman Act. The decision below also disagreed with the district court decision in this case.

In *Battipaglia* v. *New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), the Second Circuit Court of Appeals upheld New York's price posting system against an antitrust challenge identical to that presented by the retailers in this case. The New York statute, N.Y. Alco. Bev. Cont. Law § 101-b (McKinney 1987), required liquor or wine wholesalers to publicly file their prices, adhere to those prices for a fixed period of time (subject to a three-day right to lower prices to meet competition) and offer those prices uniformly to all retailers. *Battipaglia*, 745 F.2d at 168.

Like the Ninth Circuit in this case, Judge Friendly, writing for the panel majority, examined whether the price posting law was preempted by the Sherman Act under the test set forth in *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982). *Battipaglia*, 745 F.2d at 173;

Petition, Appendix A, App-7-8. Unlike the Ninth Circuit in this case, Judge Friendly found that the price posting law did not constitute a *per se* violation of the Sherman Act and therefore was not preempted by that statute. *Battipaglia*, 745 F.2d at 175.[2]

The New York Court of Appeals has also upheld the New York price posting statute against the same challenge presented in this case. *Admiral Wine & Liquor Co.* v. *State Liquor Authority*, 61 N.Y.2d 858, 462 N.E. 2d 146, 473 N.Y.S. 969 (1984). The Court held:

> Subdivision 3 of § 101-b of the Alcoholic Beverage Control Law does not violate the Sherman Antitrust Act .... Subdivision 3 of § 101-b ... is a price-posting statute, which simply requires the dealer to file with the State, on a monthly basis, a list of the prices the dealer himself has decided to charge for his products during that period with provision for a downward modification of that price. Subdivision 3 of § 101-b does not authorize anyone to determine retail prices for wine, nor does it bind other wholesalers as to the prices which they may charge their dealers.

Id. at 860-61, 462 N.E.2d at 146-47, 473 N.Y.S. at 970.

In *Intercontinental Packaging Co.* v. *Novack*, 348 N.W.2d 330 (Minn. 1984), the Minnesota Supreme Court upheld that state's liquor price posting system against the same antitrust challenge presented here.

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[2] In *Battipaglia*, Judge Friendly cited to the district court decision in this case, and described this case as concerning "Oregon price posting and adherence provisions substantially similar to New York's ...." *Battipaglia*, 745 F. Supp. at 173.

The Court employed the preemption analysis of *Rice* v. *Norman Williams Co.* and, like Judge Friendly in *Battipaglia*, found that there was no preemption of the state price posting law. The Court held:

> Enforcement of a state statute may be enjoined only if the statute on its face irreconcilably conflicts with federal antitrust policy. Since Minn. Stat. § 340.983 (1982) does not mandate conduct violative of the Sherman Act, the Sherman Act does not preempt the state regulatory system.

Intercontinental Packaging Co., 348 N.W.2d at 335.

In *Wine and Spirits Specialty, Inc.* v. *Daniel*, 666 S.W.2d 416 (Mo. 1984) *(en banc)*, the Missouri Supreme Court rejected a challenge to that state's price posting law identical to the challenge presented here. The Missouri statute required liquor wholesalers to post prices monthly, adhere to those prices, and avoid quantity and payment discounts in excess of one percent each. *Id.* at 417. The Missouri court analyzed the preemption question under *Rice* v. *Norman Williams Co. Id.* Like the courts in New York and Minnesota, but unlike the court below in this case, the Missouri court found that the price posting laws were not a *per se* violation of the Sherman Act:

> Initially, each wholesaler determines individually the price it will charge retailers. While the wholesalers are afforded the opportunity to change their prices, they are not so required; any change must be based on their independent judgment. The price posting laws neither authorize nor sanction individual wholesalers to contract, combine or conspire to fix the prices

> that they or any other wholesaler or retailer charge. Rather, the price posting laws mandate unilateral action on the part of every wholesaler . . . .
>
> . . . [W]e find no *per se* violation due to price fixing or restraint of trade; therefore, we cannot constitutionally condemn Missouri's price posting laws as mandating conduct that constitutes a violation in all cases or that places irresistible pressure on private parties to violate the antitrust laws. *Rice*, 458 U.S. at 661, 102 S. Ct. at 3300.

Wine and Spirits Specialty, Inc., 666 S.W.2d at 418-19.

In *Serlin Wine & Spirit Merchants, Inc.* v. *Healy*, 512 F. Supp. 936, 939-42 (D. Conn.), *aff'd sub nom. Morgan* v. *Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), the district court for the District of Connecticut upheld that state's price posting statute on the ground that the law was facially valid under the Sherman Act and that the law was in any event protected by state action immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943). The Second Circuit affirmed on the grounds stated in the district court opinion. *Morgan*, 664 F.2d at 355.[3]

In *Enrico's, Inc.* v. *Rice*, 551 F. Supp. 511, 513 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984), the district court for the Northern District of California held that a distilled spirits price posting scheme was not preempted by the Sherman Act under the analysis set forth in *Rice* v. *Norman Williams Co.*

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[3] The Second Circuit appeared to focus more on the state action immunity issue than the facial conflict issue. *Morgan*, 664 F.2d at 355-56; *see Battipaglia*, 745 F.2d at 172 n. 9.

Finally, the district court in this case, Petition, Appendix B, held that the Oregon price posting and price adherence rules were not a *per se* violation of the Sherman Act and therefore were not subject to preemption under *Rice* v. *Norman Williams Co.* See Petition, Appendix B, App-26-27.[4]

The direct conflict between the decision below and the many other decisions cited herein strongly supports the allowance of a writ of *certiorari* in this case.

B. The decision below involves an important constitutional issue of nationwide significance.

The question whether state price posting laws for alcoholic beverages are preempted by the Sherman Act has nationwide importance. At least 24 states other than Oregon have price posting laws similar in effect to the rules invalidated by the Ninth Circuit in this case. Like Oregon, many of these states have relied upon price posting for decades as a central component of their regulation of the manufacture and sale of alcoholic beverages. The states with price posting laws in effect at the present time are:

1.	Arizona —	Ariz. Rev. Stat. Ann. § 4-251-253 (1977)
2.	California —	Cal. Bus. & Prof. Code §§ 24756, 25000 (West 1985)

[4] The only price posting decision agreeing with the decision below is the decision of the California Court of Appeal for the First District in *Lewis-Westco & Co.* v. *Alcoholic Beverage Control Appeals Board*, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552 (Cal. Ct. App. 1982), *cert. denied*, 464 U.S. 863 (1983).

3.	Connecticut —	Conn. Gen. Stat. § 30-63 (1975)
4.	Delaware —	Del. Code Ann. tit. 4, § 508 (1985)
5.	D. C. —	D. C. Mun. Regs. tit. 412 (1986)
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7.	Georgia —	Ga. Admin. Comp. ch. 560-2-4.11 (1987)
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9.	Idaho —	Idaho Code § 23-1029 (1977)
10.	Kansas —	Kan. Stat. Ann. § 41-1101 (1986)
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14.	Missouri —	Mo. Rev. Stat. § 311.332-338 (1963)
15.	Nebraska —	Neb. Rev. Stat. § 53-170.03 (1984)
16.	New Jersey —	N.J. Admin. Code tit. 13, § 2-24.6 (1985)
17.	New Mexico —	N.M. Stat. Ann. § 60-8A-12 (1978)
18.	New York —	N.Y. Alco. Bev. Cont. Law § 55-b; § 101-b (McKinney 1987)

19. Oklahoma —	Alcohol Beverage Law Enforcement Commission Rules, Article 3, § 4 (1986)
20. Pennsylvania —	Pa. Admin. Code § 11.201B (Shepard's 1972)
21. South Dakota —	S.D. Admin. R. 64:75:03:02 (1986)
22. Tennessee —	Tenn. Code Ann. § 57-6-104(a) (1983)
23. Vermont —	Vt. Admin. Comp. (Dept. of Liquor Control) R. # 12 (1985)
24. Washington —	Wash. Admin. Code R. 314-20-100 (1986)

The decision below puts into doubt the validity of every one of these laws. Those states within the Ninth Circuit, such as Washington, Idaho and California, are most directly affected, but every price posting law in the country could ultimately be challenged under the decision below.

The nationwide significance of the issue is further justification for the allowance of a writ of *certiorari* in this case.

C. The decision below is erroneous.

The decision below is irreconcilably in conflict with the rulings of this Court in *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986); *Rice* v. *Norman Williams Co.*, 458 U.S. 654; *Exxon Corp.* v. *Governor*

of Maryland, 437 U.S. 117 (1978); and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966), and will be reversed on appeal to this Court.

In *Fisher*, the Court held that a Berkeley, California ordinance imposing mandatory rent ceilings was not preempted by Section 1 of the Sherman Act because "the rent controls established by Berkeley's ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act . . . ." 475 U.S. at 270.

The Court found that the ordinance operated unilaterally upon each property owner; there was no agreement among the owners to fix rents, and thus no concerted action. *Id.* The Court also found that the Berkeley rent control ordinance was not a "hybrid" restraint of the type condemned by the Court in *Schweggmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *Fisher*, 475 U.S. at 268-69.

In the decision below, the Ninth Circuit found, as in *Fisher*, that the price posting rules operate unilaterally upon each beer and wine distributor, and that there was no concerted action among the distributors. Petition, Appendix A at App-13. Indeed, the Ninth Circuit relied on *Fisher* to affirm the judgment in favor of the distributors because of the lack of concerted action on their part. Petition, Appendix A at App-13 n. 4.

However, the Court below departed from *Fisher*

and erred in holding that the Oregon price posting regulations "constitute a 'hybrid' restraint in violation of the Sherman Act." Petition, Appendix A at App-13 (footnote omitted). The Court stated that "[t]he regulations constitute a 'hybrid' restraint because . . . Oregon allows private parties to set the prices and does not review the reasonableness of those prices." *Id.*

In so ruling, the Ninth Circuit misunderstood and misapplied the concept of "hybrid" restraint as used by the Court in *Fisher*. The result is a decision which cannot be sustained.

In *Fisher*, the Court drew the concept of a "hybrid" restraint from Justice Stevens' concurrence in *Rice* v. *Norman Williams Co.*, 458 U.S. at 665 (Stevens, J., concurring in the judgment). The *Fisher* Court also drew on Justice Stevens' words to describe a "hybrid" restraint as one involving "a degree of private regulatory power." *Fisher*, 475 U.S. at 268, quoting *Rice* v. *Norman Williams Co.*, 458 U.S. at 666 n. 1.

The Court below was plainly wrong in finding the Oregon price posting rules to be a hybrid restraint in violation of the Sherman Act. A proper application of *Fisher* and *Rice* requires the conclusion that the Oregon price posting rules are not a hybrid restraint preempted by the Sherman Act.

In *Rice*, Justice Stevens distinguished a "hybrid" restraint from "a public regulatory scheme" and "a clearly private restraint." *Rice*, 458 U.S. at 665. He cited *Exxon Corp.*, 437 U.S. 117, and *Joseph E. Sea-*

gram & Sons, Inc., 384 U.S. 385, as examples of "a public regulatory scheme." *Rice*, 458 U.S. at 665. The regulatory schemes in both these cases were very similar in purpose and effect to Oregon's price posting rules.

In *Exxon Corp.*, the Court upheld, against a challenge under the federal antitrust laws, a Maryland statute requiring a producer or refiner of petroleum products to extend "voluntary allowances" uniformly to all service stations it supplies. *Exxon Corp.*, 437 U.S. at 119-120. By limiting the power of a wholesaler to vary the prices at which it sold goods to retailers, the statute prevented whoesalers from offering preferential treatment to some retailers at the expense of others. *Id.*

Joseph E. Seagram & Sons, Inc., 384 U.S. 35, was, in part, a price posting case. A New York statute required alcoholic beverage manufacturers and importers to post their prices to wholesalers and retailers with a state agency on a monthly basis, and to accompany the posting with an affirmation that the posted prices were no higher than the lowest price at which sales for the product had been made anywhere in the United States during the preceding month.[5] *Id.* at 39-40. Under this statute, each product seller unilaterally determined and posted its prices, and product purchasers were free to resell the product at whatever price they wished. The Court upheld the

[5] Oregon does not have a price affirmation statute. Distributors are free to set their posted prices at any level they wish without regard to extraterritorial sales.

statute against a challenge under the antitrust laws, among other grounds. [6]

In both *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, state laws regulated the manner in which private sellers could price their products, but left to each seller the ultimate pricing decision, and left to each buyer unfettered freedom to resell the product at any price. This is what Justice Stevens meant in *Rice* v. *Norman Williams Co.* by "a public regulatory scheme."

The Oregon price posting rules operate in exactly the same way as the statutes in *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, and also constitute a "public regulatory scheme." Under the Oregon system, each distributor determines its own selling price for each product, and each retailer is free to resell the product at any price. The price posting rules regulate the pricing freedom of the distributors only to the very limited extent that each distributor must adhere to its posted prices for a fixed period of time and must offer those prices uniformly to all retailers, without quantity discounts or discounts related to delivery costs.

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[6] Some members of this Court have recently questioned the continuing vitality of *Joseph E. Seagram & Sons, Inc. See Brown-Forman Distillers* v. *New York State Liquor Authority*, 476 U.S. 573, ____ n. 6, 106 S. Ct. 2080, 2087 n. 6 (1986); *Id.*, 476 U.S. at ____ 106 S. Ct. at 2088 (Blackmun, J., concurring). However, the expressed concern has related exclusively to the commerce clause analysis in that case concerning the extraterritorial effect of the price affirmation statute. *Id.* No member of this Court has questioned the antitrust analysis in that decision.

The operation of the Oregon price posting rules is also very similar in effect to the Berkeley rent control ordinance upheld in *Fisher*. The rent control ordinance in *Fisher* set a ceiling on rents. Subject to that ceiling, each property owner was free unilaterally to set any rent he wished. The ultimate price setting decision remained with each property owner, subject to the publicly-imposed constraint. Precisely the same is true under the Oregon price posting rules: the ultimate price setting decision remains with each distributor, subject to the publicly-imposed constraints. Each retailer is free to set its own prices without any constraints.

The Oregon price posting scheme, like the laws of *Fisher*, *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, lacks the element identified by Justice Stevens as essential to a "hybrid" restraint — the element of "private regulatory power." *Rice*, 458 U.S. 665 n. 1 (Stevens, J., concurring in the judgment). The only two examples of "hybrid restraints" cited by the *Fisher* Court were *Schweggmann Bros.*, 341 U.S. 384, and *Midcal Aluminum, Inc.*, 445 U.S. 97. Since *Fisher*, a third example was identified in *324 Liquor Corp.* v. *Duffy*, —— U.S. ——, —— n. 8, 107 S. Ct. 720, 726 n. 8 (1987).

Schweggmann Bros., *Midcal* and *324 Liquor Corp.* all involve the same evil—a state statute implementing resale price maintenance, a *per se* violation of the Sherman Act. The "private regulatory power" created by each of these statutes was the power of a product seller to dictate the price at which the product would be re-

sold — a power forbidden by the Sherman Act. The reason it was a "regulatory" power was that one private party had the right to *regulate* the prices set by another private party.

The Oregon price posting rules do not confer private regulatory power upon any party. No distributor has the power to dictate, control or regulate the prices set by any retailer, or by any other distributor. Nothing in the Oregon price posting rules permits resale price maintenance, and resale price maintenance would be actionable under the Sherman Act if it were to occur in Oregon. Horizontal price fixing is not permitted by the Oregon rules, and would also violate the Sherman Act if it occurred.

The Court below missed this basic point in characterizing the Oregon price posting rules as a "hybrid" restraint because "Oregon allows private parties to set the prices and does not review the reasonableness of those prices." Petition, Appendix A at App-13. In Oregon, each distributor sets its own prices, but no distributor sets prices for any other distributor or for any retailer. There is no "private regulatory power" under the Oregon rules, and they are not a "hybrid" restraint. As in *Fisher*, *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, the Oregon rules are a "public regulatory scheme" which does not conflict with the Sherman Act and is not preempted by that statute.

The decision below resulted in a paradoxical outcome which is fundamentally at odds with the purpose of the Sherman Act. Although the Court found *no* anticompetitive conduct by the distributors, the Court

would nonetheless impose on them a system in which the *state* must determine the "reasonableness" of their prices. Foisting such cumbersome and ill-defined bureaucratic control on the independent price-setting decisions of the distributors could only *reduce* competition, contrary to the basic goal of the Sherman Act.

The judgment for the distributors below will be meaningless if the end result of this lawsuit is to replace the current competitive marketplace with a system of state price supervision. In order to preserve the honest and strong competition which exists in Oregon under the current price posting rules, Coast, along with the other 48 members of the Oregon Beer and Wine Distributors Association, supports the petition for a writ of *certiorari* in this case.

CONCLUSION

The Court should issue a writ of *certiorari* to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

Dated this 18th day of December, 1987.

Respectfully submitted,

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